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Direcção-Geral da Política de Justiça
Gabinete de Relações Internacionais



MINISTÉRIO DA JUSTIÇA

FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW – HAGUE QUESTIONNAIRE

REPLIES BY THE PORTUGUESE DELEGATION

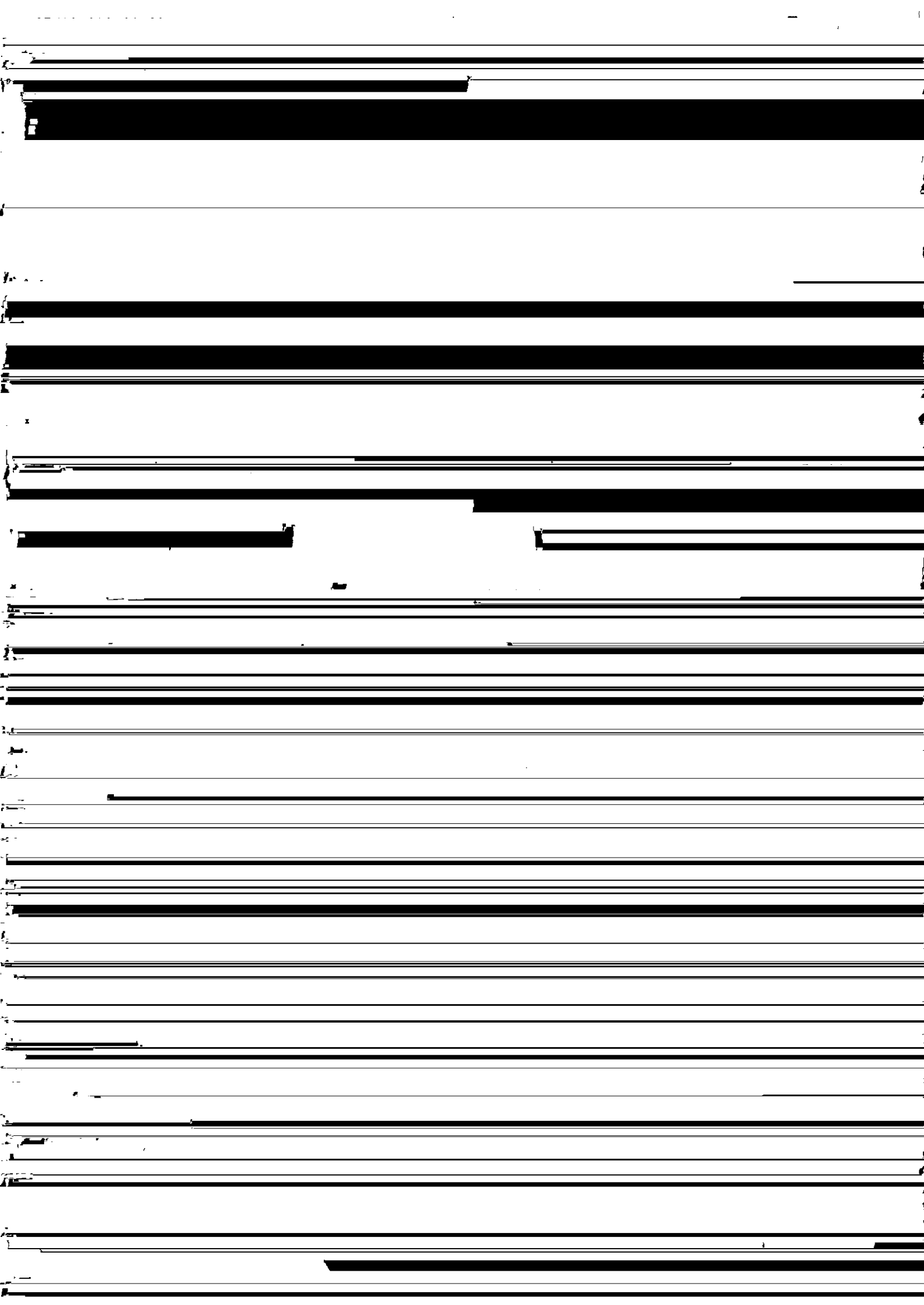
PART I – GENERAL QUESTIONS

1. Is your State Party to:

- a) The London Convention - YES
- b) The Montevideo Convention -
- c) The Minsk Convention -
- d) Any bilateral convention -

2. If not, does your State intend to become in the near future a Party to:

- a) The London Convention - N/A
- b) The Montevideo Convention -



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 NO

12. If yes, do people in other States have access to this service at the same costs as residents?

 YES

Service is provided free of charge both to Portuguese citizens and foreigners, public and private entities;

 NO

13. Do you foresee the proportion of people in other States using these services increase in the future?

 YES NO

Please specify:

PART III – Access to information on the content of foreign law at the litigation stage

14. Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase. If no estimate can be obtained for 2006, please refer to another year. Percentage: % (year ()). Likely to increase: YES NO

There are no available statistics on this matter. It should be emphasized that courts are not bound to submit a request when the question of application of foreign law arises.

15. Please indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.

 Marriage and nullity of marriages

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- Divorce and legal separation
- Parental responsibility
- Parent-child relationship
- International child protection including child abduction and child adoption
- Protection of adults
- Maintenance (child support and other forms of family support)
- Traffic accidents
- Products liability
- Other types of tort
- Consumer protection
- Commercial contracts
- Sale of goods
- Securities transactions
- Property
- Inheritance
- Bankruptcy
- Choice of court agreements
- Other, please specify:

There are no available data on this matter.

16. Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

Countries with which Portugal has more significant migrant flows, namely France, Spain, United Kingdom, Netherlands, Germany, Italy, Luxemburg, Belgium, Switzerland, Eastern European countries, as Romania, Russia, Moldova and Ukraine, as well as Portuguese speaking countries, as Angola, Guinea Bissau and Cape Verde.

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17. In your State, a judicial authority ascertains foreign law (check more than one box if applicable):

- a) ex officio without the assistance of an expert (e.g. law firm, specialised institute, university, government (i.e. specialised department or embassy), etc.
- b) ex officio with the assistance of an expert
- c) by submitting, ex officio, a request for information under a bilateral or multilateral treaty (where applicable)
- d) as the result of an (express) agreement of all parties, without the assistance of an expert
- e) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- f) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
- g) by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- h) at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
- i) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- j) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
- k) by submitting, at a request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- l) by any other method (please specify):

Comments:

According to article 348 of the Portuguese Civil Code, although the party who requests the application of foreign law has a burden of proof of both existence and content of the foreign law invoked, the judge must also seek to determine such existence and content, by all means available ("*iura novit curia*"). It has been discussed among Portuguese doctrine whether this should be considered or not as a burden of proof *proprio sensu*, with some authors considering that this is in

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fact a mere burden of "*allegation*", derived from the general duty of cooperation with the court. In favour of such argument is the fact that the Civil Code expressly provides for the *ex officio* obligation in this matter. In the same line of reasoning, the Portuguese Procedural Civil Code (article 721^o) establishes that the violation of foreign law is a ground for appeal. This will be the case if foreign law is wrongly interpreted or applied, or the applicable law is not correctly determined.

An express agreement of all parties is not needed. A judicial authority will ascertain foreign law *ex officio* even if none of the parties has requested it, or the other party has admitted its existence/content or also in the case where there is no objection of the other or another party (article 348,2).

It should be noted, however, that these rules are applicable only to foreign conflict of laws rules or substantive law and not to Portuguese Private International Law rules, either from an internal or international source. Furthermore, it should be added, that interpretation of foreign law should follow the rules of the respective legal system (article 23 of the Portuguese Civil Code). Finally, as a last resource, in the case where it is deemed absolutely impossible to determine the content of foreign law in an individual case (and provided that it is not possible to follow a subsidiary connexion), portuguese law will apply. It should be stressed, however, that this possibility is widely recognized among academia and practitioners as a marginal tool to avoid *non liquet*.

18. Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in you State to ascertain the content of foreign law under any of the methods described in a), d) and b) of Question n°17:

- Internet (official legislation, case-law and legal publications websites)
- Internet (legislation, case-law and legal publications from private databases (as opposed to official databases)
- Local or personal library (local electronic databases)
- Local or personal library (printed legislation, case-law and legal publications)
- Other:

Statistics on this matter are not available. Each magistrate will follow his/her own procedure.

19. Please explain whether an, if so, how the judicial authorities in your State verify the reliability and/or authenticity of these sources and the information provided therein:

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The entities responsible for providing information, in Portugal, are official organisms within the Ministry of Justice, and there is a guarantee of updated information.

20. Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty.
Description:

If it is a request under the London Convention, procedures established therein are followed. Where a solution is not envisaged or if the Convention is not applicable, requests are often addressed to the Portuguese Embassies abroad.

21. Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question n° 17, does the expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialised institute, does it need to meet certain requirements?

 YES NO

There are no available data on this matter.

22. Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question n° 17, does the expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialised institute, does it need to meet certain requirements?

 YES NO

There are no available data on this matter.

23. Please specify which individuals and /or institutions may provide expertise under any of the methods described in b), e) and i) of Question n° 17:

a) Local private expert (eg law professor, lawyer and/or jurist in private practice)

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 YES NO

b) Foreign private expert (e.g. law professor, lawyer and/or jurist in private practice)

 YES NO

c) Local specialised institute

 YES NO

d) Foreign specialised institute

 YES NO

e) Local government (including embassies abroad)

 YES NO

f) Foreign government (including embassy in your State)

 YES NO

g) Member of the local judicial authority

 YES NO

h) Member of a foreign judicial authority

 YES NO

i) Other (s):

j) Which of the above is most often used?

24. Please indicate who bears the costs of the expertise provided under any of the methods described in b), e) and i) of Question n° 17: The requesting judicial authority The party that raised the application of foreign law The party (ies) against whom costs will be awarded

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 All parties Other:

25. Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question n° 17?

 YES NO, please explain:

26. Please describe, if possible, the common characteristics of requests for information on foreign law submitted under any of the methods described in c), g) and k) of Question n° 17: the type of question asked; who most frequently asks questions (e.g., parties with too little or no resources to afford an expert); the reasons why questions are asked (e.g., no material available in a language understood by the judicial authority seized of the matter); etc.

Description:

27. Please indicate whether judicial authorities in your State can transmit the request for information directly to a receiving agency in the State addressed under any of the methods described in c), g) and k) of Question n° 17?

 YES NO, please explain:

28. If so, can the request be transmitted by regular non-secured e-mail?

 NO, please explain

**PART IV – FUTURE DEVELOPMENTS OF AN INSTRUMENT AND OR
MECHANISMS TO ACCESS INFORMATION ON THE CONTENT OF FOREIGN
LAW**

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29. In the light of your answers to this Questionnaire, are you of the view that the Hague Conference should develop a global instrument and/or mechanisms to access information on the content of foreign law?

 YES NO

Please explain:

30. If the Hague Conference were to develop a global instrument to access information on the content of foreign law:

(a) Would you be in favour of a flexible instrument in particular with respect to:

(i) the availability of several channels through which information on foreign law can be sought and in relation to experts from whom information can be obtained?

 YES NO

Please explain: We believe the availability of several channels to this purpose may be useful, as it would allow a broader access to information. However, we find it necessary to ensure the interoperability of such channels, in order to avoid divergent information, which would only increase complexity.

ii) the use that may be made of each such channel and expert?

 YES NO

Please explain:

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- iii) the availability of information technologies to ensure a speedy process of the requests and to alleviate language barriers?

 YES NO

Please explain: We would strongly support the use of information technologies in this field. We are, however, flexible in this matter and would accept this model combined with paper-form, in order to allow countries less developed in this area to also take part on this new instrument.

- (b) Should the information received provide an objective and general description of the law in the foreign State, including references to relevant case-law (as opposed to a specific answer as to how the foreign law should be applied to the issue(s) at stake)?

 YES.

No, please explain: In order to ensure effectiveness, we would favour, in principle, a short answer to a specific question, rather than a general description or explanation of internal law. Nevertheless, it depends on the question itself, as experience shows that complexity is not solely assessed on the basis of the specific or general nature of the request.

- (c) Should the information received be non-binding (as opposed to binding)?

 YES

No, please explain: The independence of the judiciary must be respected at all times. The judge is free to interpret the law, and should not be bind to follow interpretations of the law. Furthermore, a binding information would also interfere with the lawyers work.

- (d) Should this instrument and/or these mechanisms be general in order to permit access to different areas of foreign law (as opposed to being limited to certain area(s) of the law)?

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 YES. NO, please explain:

(e) Should this instrument and/or these mechanisms contain provisions on legal assistance to accommodate individuals with little or no resources?

 YES NO, please explain:

(f) Should this instrument and/or these mechanisms be extended to notaries and other professionals who need to have access to the content of foreign law in contexts other than litigation (e.g. in relation to successions)?

 YES. NO, please explain:

31. If this is not yet the case for your State/REIO, are you of the opinion that it would be useful to make information on the content of the law of your State/REIO available online in a central database?

 YES NO

Please explain:

32. Are you of the opinion that it would be useful to have information on the content of the law of your State/REIO available online in a standard electronic format (e.g. in the form of country profiles that are based on a pre-established, harmonised structure) available in English and French (or other language(s)) in addition to its language of origin?

 YES.

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[] NO

Please explain.

33. If information on the content of the law of your State were to be made available worldwide in either of the forms mentioned in Questions Nos 31 and 32, please identify for which of the following subjects it would be most valuable?

- Legal order in general
- Organisation of the courts of justice system
- Organisation of the administrative tribunals system
- Legal professions
- Access to justice including legal aid
- Jurisdiction of the courts / administrative tribunals
- Bringing a case to a court / an administrative tribunal
- Alternative dispute resolutions
- Procedural time limits
- Applicable law
- Service of documents
- Taking of evidence and modes of proof
- Interim measures and precautionary measures
- Enforcement of judgments
- Simplified and accelerated procedures
- Marriage and nullity of marriage
- Divorce and legal separations
- Parental responsibility
- Parent-child relationship
- International child protection including child abduction and child adoption
- Protection of adults
- Maintenance (child support and other forms of family support)
- Traffic accidents
- Products liability
- Other types of tort

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- Consumer protection
- Commercial contracts
- Sale of goods
- Securities transactions
- Property
- Secured interests
- Inheritance
- Bankruptcy
- Legalisation and / or certification of documents
- Notarial acts or certificates
- Other, please specify: **matrimonial property regimes; legal persons , in particular corporate groups; Banking Law;**

34. Are you of the opinion that the instrument identified under Question No 29 should be developed in combination with either of the instruments described under Questions Nos 31 and 32?

YES

NO

Please explain

35. Other comments on the models proposed in Preliminary Document No 21 A, any other model, or on a possible future instrument in this field: No further comments

For follow-up purposes:

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